QUESTION PRESENTED

Whether there is a cause of action under 42 U.S.C. § 1983 for violations of the dormant Commerce Clause.

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No. 89-1555

In The

Supreme Court of the United States

October Term, 1990

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, et al.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Nebraska

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is a civil action in which Petitioner Mark E. Dennis, doing business as Dennis Trucking,[1] sued the State of

[1] The original petition in state court was brought in the name of the Private Truck Council of America, Inc. ("PTCA"), and Dennis Trucking (J.A. 5). The trial court dismissed PTCA as a plaintiff for lack of standing (Pet. Cert. App. 33a). A second amended petition was subsequently filed naming as plaintiff Mark E. Dennis, doing business as Dennis Trucking (J.A. 110).

Nebraska[2] and various state officials[3] to obtain a judgment declaring certain taxes imposed on motor carriers pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984)[4] to be unconstitutional and enjoining the Respondents from assessing or collecting such taxes (J.A. 110-116). Dennis alleged that the "retaliatory" taxes[5] imposed under §§ 60-305.02 and 60-305.03 were an unlawful burden on interstate commerce in violation of U.S. Const. art. I, § 8, cl.

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[2] The State of Nebraska, while named as a party in all proceedings below, was not designated as a party in this Court by petitioner (Pet. Cert. App. 1a, 28a, 31a; J.A. 110, 138, 142).

[3] Respondents Margaret L. Higgins, Director, Nebraska Department of Motor Vehicles, Gerald Strobel, Director, Nebraska Department of Roads, and Frank Marsh, Nebraska State Treasurer, are successors in office to other officials sued by Petitioner named in both their individual and official capacities (J.A. 110).

[4] The provisions of §§ 60-305.02 and 60-305.03 have since been amended by 1988 Neb. Laws, LB 1004, §§ 1 and 2 (*codified at* Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1988)).

[5] The taxes formerly imposed under §§ 60-305.02 and 60-305.03 are referred to as "retaliatory" because they were imposed on carriers operating vehicles in Nebraska that were registered in certain states that levied so-called "third structure taxes" on Nebraska-registered trucks operated in those states. "Third structure taxes" are so named because they are assessed in addition to registration fees and fuel taxes (commonly referred to as "first" and "second structure" taxes). Thus, former §§ 60-305.02 and 60-305.03 were implemented by imposing retaliatory taxes on vehicles registered in nine states (Arizona, Arkansas, Idaho, Nevada, New York, Ohio, Oregon, Pennsylvania, and Wyoming), and these taxes mirrored exactly the third structure tax that each of those states assessed on a Nebraska-registered vehicle traveling within its jurisdiction (J.A. 142). Petitioner, a motor carrier operating in interstate commerce with one tractor and two trailers registered pursuant to the laws of Ohio, was thus required to remit to Nebraska the two cent per mile third structure tax imposed on Nebraska-registered vehicles of this nature operating in Ohio (J.A. 149, 150). Between June 1, 1983, and November 17, 1984, petitioner paid a total of $52.60 in taxes to Nebraska pursuant to §§ 60-305.02 and 60-305.03 (J.A. 150).

3; constituted a denial of the petitioner's privileges and immunities in violation of U.S. Const. art. IV, § 2, cl. 1; constituted a grant by the Nebraska Legislature of special and exclusive privileges, immunities, and franchises in violation of Neb. Const. art. III, § 18; and violated 42 U.S.C. § 1983 (1982) by depriving petitioner of rights secured by the U.S. Constitution (J.A. 114-116).

Following a trial on stipulated facts, the state district court held that the challenged statutes violated the dormant Commerce Clause, and the court permanently enjoined Respondents from assessing, levying, or collecting the taxes or fees imposed pursuant to §§ 60-305.02 and 60-305.03 (Pet. Cert. App. 29a, 30a). The trial court dismissed the remaining counts, holding that Dennis failed to prove he was entitled to judgment under U.S. Const. art. IV, § 2, cl. 1; Neb. Const. art. III, § 18; or 42 U.S.C. § 1983 (*id.* at 30a). The trial court's order also provided that Dennis and his attorneys were "entitled under the Equitable Fund Doctrine to payment of their expenses and reasonable fees" (*id.*). Dennis filed a motion for new trial, asserting that the common fund from which such expenses and fees were to be paid was the total amount of taxes available for refund pursuant to the court's order, but the court overruled this motion (*id.* at 4a).

Dennis appealed, contending that the district court erred in denying his claims under 42 U.S.C. § 1983, in dismissing his claim under U.S. Const. art. IV, § 2, cl. 1, and in denying his claim regarding the composition of the common fund. Respondents cross-appealed the trial court's finding that Dennis and his attorneys were entitled to payment of their expenses and fees under the Equitable Fund Doctrine (*id.*).[6] On February 16, 1990, the Nebraska Supreme Court affirmed the trial court's determination that Dennis' claim for violation

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[6] Respondents did not appeal the trial court's finding that the challenged statutes violated the dormant Commerce Clause (Pet. Cert. App. 4a).

of the dormant Commerce Clause did not state a cause of action under 42 U.S.C. § 1983. In addition, the Nebraska Supreme Court affirmed the district court's dismissal of Dennis' claim under U.S. Const. art. IV, § 2, cl. 1, and reversed the district court's holding that Dennis and his attorneys were entitled to expenses and fees under the Equitable Fund Doctrine (Pet. Cert. App. 1a-27a).[7]

SUMMARY OF ARGUMENT

A. The Nebraska Supreme Court correctly held that a claim for violation of the dormant Commerce Clause does not establish a cause of action under 42 U.S.C. § 1983, because such a claim does not involve the deprivation of "any rights, privileges, or immunities secured by the Constitution."

1. In *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444, 448 (1989), this Court held that a party seeking relief under § 1983 "must assert the violation of a federal right." The Court pointed out that "violations of federal law" do not necessarily involve the deprivation of federal "rights." *Id.* Under *Golden State*, the governing standard for determining whether a constitutional "right" has been violated, for purposes of § 1983, is whether the constitutional provision in question is intended to confer specific and definite benefits on the plaintiff that are binding obligations of a state governmental unit and are within the competence of the judiciary to enforce. *Id.* at 448, 449.

2. The dormant Commerce Clause does not secure any constitutional "right" to private market participants, such as Petitioner Dennis, within the meaning of § 1983. The original and continuing purpose of the Commerce Clause is to "distribut[e] . . . power between the national and state

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[7] Dennis did not seek review in this Court of the Nebraska Supreme Court's determinations with respect to U.S. Const. art. IV, § 2, cl. 1, and the Equitable Fund Doctrine.

governments,"[8] by establishing federal supremacy in the regulation of interstate commerce, so that the national interests in political and economic union can be preserved.[9] Thus, the Commerce Clause is closely analogous to the Supremacy Clause in affirming the priority of valid exercises of federal power over conflicting state rules in the commercial arena. Because its essential function is to allocate federal and state powers, the Commerce Clause does not create constitutional "rights" that are enforceable under § 1983 any more than the Supremacy Clause does. *See Golden State*, 110 S.Ct. at 449, 450.

This Court has recognized that the Commerce Clause "protects the interstate market, *not particular interstate firms*, from prohibitive or burdensome regulations."[10] Individual participants in the interstate market receive only indirect and incidental benefits from the Commerce Clause's restraints on state action. In addition, even these secondary benefits can be qualified or removed by legislation adopted either by Congress itself or by the states acting pursuant to congressional authority. Thus, the dormant Commerce Clause does not protect any "right" in the sense contemplated by § 1983, because it does not provide a specific and definite "guarantee of freedom for private conduct that the State may not abridge." *Golden State*, 110 S.Ct. at 452.

Dennis' mere standing to bring a federal claim under the dormant Commerce Clause is not equivalent to a "right" cognizable under § 1983. In cases decided soon after the enactment of § 1983, this Court held that § 1983's reference to "rights . . . secured by the Constitution" has a much narrower scope than the federal question jurisdiction granted

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[8] *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945).

[9] *E.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-39 (1949).

[10] *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (emphasis added).

by 28 U.S.C. § 1331 over "all civil actions arising under the Constitution."[11] Moreover, in contrast to the standard for defining "rights" under § 1983, which requires evidence of a constitutional purpose to confer specific and definite benefits on the plaintiff, the lenient test for federal standing can be satisfied even if there is *no* evidence of an intent to benefit the plaintiff.[12] Dennis does not have any guaranteed individual entitlement to engage in interstate commerce, and his indirect or derivative standing to assert the national interests protected by the Commerce Clause falls far short of an individual "right" protected by § 1983.

The legislative history of § 1983 confirms that the dormant Commerce Clause does not create any "right" cognizable under § 1983. Proponents of the statute drew a clear distinction between constitutional provisions guaranteeing individual rights, which would be enforced under § 1983, and provisions allocating powers between the federal and state governments, which would not be altered by the statute. Thus, while § 1983 was enacted to ensure "the protection of personal liberties and civil rights," it was *not* intended to affect "[t]he protection of commerce" that already existed under the Commerce Clause.[13]

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[11] *E.g.*, *Bowman v. Chicago & Northwestern Ry.*, 115 U.S. 611 (1885) (plaintiffs' allegation that a state statute interfered with their "right" to ship goods in interstate commerce might have stated a claim "arising under" the Constitution, but it did not show the deprivation of any "right . . . secured by" the Constitution).

[12] *Golden State*, 110 S.Ct. at 448, 449; *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396, 399-400 (1987) (federal test for standing is satisfied if the plaintiff is "arguably within the zone of interests to be protected by the statute or constitutional guarantee in question"; thus, "there need be no indication of congressional purpose to benefit the would-be plaintiff").

[13] Cong. Globe, 42d Cong., 1st Sess. 333 (1871) (remarks of Rep. Hoar).

3. The extension of § 1983 to dormant Commerce Clause claims would not further the purposes of the statute and would seriously prejudice the interests of state and local governments. Claims under the dormant Commerce Clause, unlike claims brought to redress violations of individual constitutional rights, are generally economic in nature and typically involve disputes between business interests and government entities and officials over taxes or regulatory actions. For over 150 years, market participants in interstate commerce have had adequate incentives and opportunities to litigate Commerce Clause claims. The only practical reason for bringing such claims under § 1983 would be to enhance the availability of damages and to secure attorneys fees under § 1988.

Redefining claims for violations of the dormant Commerce Clause as vindications of constitutional "rights" triggering potential damage awards and virtually automatic awards of attorneys fees under §§ 1983 and 1988 would undoubtedly multiply such litigation. A proliferation of Commerce Clause litigation under § 1983 would impose substantial financial burdens on state and local government officials and would likely chill their willingness to adopt innovative policies in areas such as taxation and business regulation. Absent some clear directive from Congress that such an assault on the regulatory interests of state and local governments was intended by §§ 1983 and 1988, the Court should decline to expand § 1983 into the realm of Commerce Clause litigation.

B. If the Court should determine that § 1983 provides a remedy for violations of the dormant Commerce Clause, this action should be remanded to allow the Nebraska state courts to determine whether they must entertain a claim under § 1983 in a challenge to a state tax. A number of state courts have refused to entertain § 1983 claims in cases involving state taxes.[14] State courts reaching this conclusion have relied

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[14] *See* cases cited *infra* in note 132.

on the federal statutory and judicial policy limiting federal court jurisdiction in actions involving state taxes, as set forth in the Tax Injunction Act,[15] and the Court's decision in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*,[16] holding that challenges to state taxes may not be brought in federal court where an adequate state court remedy is available. This Court has recently recognized that the issue of whether state courts *must* assume jurisdiction under § 1983 in challenges to the imposition of state taxes is "not entirely clear." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987).

Because the court below held that dormant Commerce Clause claims do not establish a cause of action under § 1983, there was no need or occasion for that court to consider whether, if such a claim were cognizable, that court was required to entertain the § 1983 claim in this case involving a challenge to a state tax. In *Ragland*, this Court deemed it appropriate to remand the issue of whether a state court must entertain a § 1983 claim in a state tax action for initial determination by the state courts. 481 U.S. at 233-34. Accordingly, Respondents request this Court, if it should hold that the courts below erred in finding that a violation of the dormant Commerce Clause does not state a cause of action under § 1983, to remand this case to the courts below for a determination of whether they are required to entertain a § 1983 claim in a challenge to a state tax.

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[15] 28 U.S.C. § 1341 (1982).

[16] 454 U.S. 100 (1981).

ARGUMENT

I. PETITIONER'S CLAIM FOR VIOLATION OF THE DORMANT COMMERCE CLAUSE IS NOT COGNIZABLE UNDER 42 U.S.C. § 1983, BECAUSE THE COMMERCE CLAUSE DOES NOT SECURE ANY "RIGHTS, PRIVILEGES, OR IMMUNITIES" WITHIN THE MEANING OF § 1983.

A. Section 1983 Provides a Remedy Only for Deprivations of "Rights, Privileges, or Immunities" Secured by the Constitution or Federal Laws.

Section 1983 provides a civil remedy for any person who is deprived under color of state law of "any rights, privileges, or immunities secured by the Constitution and laws." In *Golden State*, this Court established a "two-step inquiry" to be followed in determining whether a claimed violation of the Constitution or a federal statute is cognizable under § 1983:

> First, the plaintiff must assert the violation of a federal right. . . . Section 1983 speaks in terms of "rights, privileges, or immunities," not violations of federal law. . . .
>
> Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress "specifically foreclosed a remedy under § 1983," . . . by providing a "comprehensive enforcement mechanis[m] for protection of a federal right."[17]

The primary issue raised by this case is whether a discriminatory state tax statute that violates the dormant Commerce Clause deprives the affected taxpayers of any "right" secured by the Constitution.[18] In *Golden State*, this Court

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[17] 110 S.Ct. at 448 (citations omitted; brackets in original).

[18] As shown *infra* in Argument, Part II, a secondary issue would be raised, in the event this Court held that dormant Commerce Clause claims are generally cognizable under § 1983, as to whether this case should be remanded to the courts below to permit them to determine whether they must entertain a § 1983 claim in a challenge to a state tax.

stated that the following three factors should be considered in assessing "whether a federal right has been violated" for purposes of § 1983: (1) whether the constitutional or statutory provision in question "creates obligations binding on the governmental unit"; (2) whether the "interest" asserted by plaintiff is so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce"; and (3) whether the provision in question was "inten[ded] to benefit" the plaintiff.[19]

Petitioner Dennis acknowledges that the controlling test for defining federal "rights" under § 1983 is set forth in *Golden State*.[20] However, Dennis commits two serious errors in applying this test. First, Dennis indicates that *all* "constitutional violations" must involve the deprivation of "rights" within the scope of § 1983.[21] This Court expressly rejected such a construction of § 1983 in *Golden State*.[22]

Second, Dennis restates the *Golden State* test for defining "rights" so that it contains *only two* factors: "whether the provision in question imposes specific obligations on the governmental unit," and "whether the individual has standing to invoke the provision in question."[23] This restatement departs significantly from the actual *Golden State* test. In the first place, Dennis completely ignores the *third* factor in *Golden State – viz.*, whether the relevant provision was "inten[ded] to benefit" the plaintiff.[24] Additionally, Dennis recasts the second factor relating to the quality of the plaintiff's "interest" as a simple question of standing. As shown

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[19] 110 S.Ct. at 448 (citations omitted; brackets in original).

[20] Petitioner's Brief ("Pet. Br.") 23-24.

[21] *See* Pet. Br. 8-9, 15-16.

[22] 110 S.Ct. at 448 ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' *not* violations of federal law") (emphasis added).

[23] Pet. Br. 24.

[24] *Golden State*, 110 S.Ct. at 448.

below, mere standing to challenge a constitutional violation is not sufficient by itself to establish a constitutional "right" cognizable under § 1983.[25]

Under this Court's construction of § 1983 in *Golden State* and previous cases, a constitutional or statutory provision establishes "rights" cognizable under § 1983 only if the provision is intended to confer on the plaintiff (or a class in which the plaintiff is a member) specific and definite benefits which the plaintiff can enforce as binding obligations of a state governmental unit and which are within the competence of the courts to enforce.[26] By focusing on whether there is a constitutional or statutory intent to confer specific and enforceable benefits on individual persons, this standard for defining "rights" is consistent with the legislative history of § 1983. Section 1983 was originally adopted as Section 1 of the Civil Rights Act of 1871.[27] The primary focus of the proponents of the 1871 Act was to protect the individual rights guaranteed under the Thirteenth, Fourteenth and Fifteenth Amendments. Congress determined that these individual rights needed to be protected from infringement by private groups (especially the

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[25] *See infra* Argument, Part I(B)(2)(b).

[26] *Golden State*, 110 S.Ct. at 448, 449; *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 423, 432 (1987) (in order to establish "enforceable rights" under § 1983, a statutory provision must confer "specific and definite" benefits on a defined class of persons); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 11, 15, 19 (1981) (in order to create "rights" cognizable under § 1983, a federal statute must be intended to "create substantive rights" that are "enforceable" by a class of beneficiaries).

[27] *See, e.g., Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 664 (1978).

Ku Klux Klan) and from impairment due to official hostility or inaction in the Southern states.[28]

Representative Shellabarger, the leading sponsor of the 1871 Act in the House,[29] stated that Section 1 would provide a federal civil remedy to all persons deprived by state action of "rights to which they are entitled under the Constitution by reason and virtue of their national citizenship."[30] Shellabarger further indicated that the "rights, privileges, or immunities" protected by the 1871 Act would consist of "the personal rights which the Constitution guarantees as between persons in the State and the State itself."[31] Similarly, Representative Bingham, a leading supporter of the 1871 Act, stated that the Act would protect "every individual citizen of the Republic . . . to the extent of the rights guarantied to him by the Constitution."[32] Representative Maynard, another supporter

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[28] *See, e.g., United Brotherhood of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825, 832-38 (1983); *Chapman*, 441 U.S. at 611; *Monroe v. Pape*, 365 U.S. 167, 171-80 (1961); Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 Geo. L.J. 1493, 1497, 1551-53 (1989); *Developments in the Law-Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1153-56 (1977).

[29] Shellabarger was the chairman of the House select committee that drafted the original version of the 1871 Act. He introduced the legislation in the House and served as House floor manager for the Act. *See Monell*, 436 U.S. at 665; Cong. Globe, 42d Cong., 1st Sess. (1871) (hereinafter "Cong. Globe") at 244, 249, 317.

[30] Cong. Globe, 42d Cong., 1st Sess. (1871) App. (hereinafter "Cong. Globe App.") at 68, *quoted in Monell*, 436 U.S. at 683.

[31] *Id.* at 70 (discussing scope of "rights, privileges, or immunities" protected by original House version of Section 2 of 1871 Act). As discussed *infra* at note 98 and accompanying text, Shellabarger's comments concerning the scope of the "rights, privileges, or immunities" protected under the original House version of Section 2 of the 1871 Act are directly relevant to the interpretation of § 1983.

[32] *Monell*, 436 U.S. at 685 n.45 (quoting Cong. Globe App. 81, and noting that Bingham was the author of Section 1 of the Fourteenth

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of the 1871 Act, agreed that the Act would protect "any of the personal rights which the Constitution guarantees to the citizen."[33]

Thus, the legislative history of the 1871 Act confirms this Court's understanding that a constitutional provision creates "rights" cognizable under § 1983 only if the provision is intended to guarantee specific and definite benefits to the plaintiff that he can enforce as obligations binding on a state governmental unit. As shown below, the dormant Commerce Clause creates no such "rights."

B. The Dormant Commerce Clause Does Not Secure any "Rights, Privileges, or Immunities" within the Meaning of § 1983.

1. The Purpose of the Commerce Clause Is to Allocate Power between the Federal and State Governments in Order to Preserve National Political and Economic Union.

The Nebraska Supreme Court correctly determined that the dormant Commerce Clause "does not establish individual rights against government, but instead allocates power between the state and federal governments."[34] The Commerce Clause contains no reference to any right, privilege, or immunity secured to any person. The provision appears as one of a series of clauses in Article I, § 8 of the Constitution granting

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Amendment). Bingham further indicated that the "privileges and immunities" protected under the 1871 Act would be those "guaranteed by the amended Constitution and expressly enumerated in the Constitution." Cong. Globe App. 84.

[33] Cong. Globe App. 310 (discussing scope of "rights, privileges, or immunities" protected under original House version of Section 2 of the 1871 Act).

[34] Pet. Cert. App. 5a (quoting *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984)).

specified powers to Congress. The Commerce Clause simply states that "[t]he Congress shall have Power . . . To regulate commerce . . . among the Several states."[35]

Thus, by its own terms, the Commerce Clause only grants power to Congress and does not restrict state action or grant rights to any person.[36] However, this Court has long held that the "dormant" Commerce Clause "prohibits States from taking certain actions respecting interstate commerce even absent congressional action."[37] This Court's decisions make clear that the primary effect of the dormant Commerce Clause is to accomplish a "distribution of power between the national and the state governments" regarding the regulation of commerce.[38] Ever since *Cooley v. Board of Wardens*,[39] this Court's applications of the dormant Commerce Clause have sought to balance the power of Congress to regulate interstate commerce against the reserved authority of the states to enact

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[35] U.S. Const. Art. I, § 8, cl. 3. It is noteworthy that Professor Hohfeld classified legal interests as falling into four categories: "rights," "privileges," "immunities," and "powers." While the first three categories are protected under § 1983, "powers" are not. Moreover, Hohfeld pointed out that a "right" is not equivalent to a "power." Hohfeld, *Some Fundamental Legal Concepts Applied to Judicial Reasoning*, 23 Yale L.J. 16, 30, 45 (1913).

[36] *See e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987); *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2344 (1990) (Scalia, J., concurring); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 318 (1851).

[37] *CTS Corp.*, 481 U.S. at 87. *See also, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978).

[38] *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 768 (1945).

[39] 53 U.S. (12 How.) 299 (1851). *Cooley* is generally recognized as the first statement by this Court of the dormant Commerce Clause doctrine. *See, e.g., CTS*, 481 U.S. at 87; *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 370 (1976); L. Tribe, *American Constitutional Law* § 6-4 at 406-07 (2d ed. 1988).

laws on matters of legitimate local concern, including local tax laws.[40]

This Court's decisions have also affirmed that the fundamental purpose of the dormant Commerce Clause is to preserve national political and economic union.[41] The Commerce Clause was designed to prevent a recurrence of the "economic Balkanization that had plagued relations among . . . the States under the Articles of Confederation."[42] The Founders were convinced that the "drift toward anarchy and commercial warfare between states . . . [had come] 'to threaten at once the

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[40] *Cooley*, 53 U.S. (12 How.) at 318-20; *Welton v. Missouri*, 91 U.S. 275, 281-82 (1876); *Southern Pacific*, 325 U.S. at 767, 768-69 ("there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce. . . . [R]econciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved"); *Cottrell*, 424 U.S. at 371 ("in areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause – where local and national powers are concurrent – the Court in the absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims' "); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328-29 (1977) (recognizing the need to balance the congressional power to regulate interstate commerce and the "national interest in free and open trade," on the one hand, with the "legitimate interest of the individual States in exercising their taxing powers," on the other).

[41] *E.g., H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533-35, 537-39 (1949) (the Commerce Clause, and this Court's decisions thereunder, are intended to preserve "the solidarity and prosperity of this Nation" by ensuring that "our economic unit is the Nation"); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (the Commerce Clause was designed to preserve "our national solidarity" and "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division"). *See generally* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43 (1988).

[42] *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

peace and safety of the Union.' "[43] In fact, this Court's early decisions under the Commerce Clause repeatedly invoked the Founders' goals of preventing commercial antagonisms between the states, ensuring a united trade policy with respect to foreign nations, and establishing a secure basis for national political union and economic prosperity.[44]

In short, the primary objective of the Commerce Clause is to ensure national political and economic union by establishing the supremacy of federal control over interstate commerce. The Commerce Clause, therefore, is closely analogous to the Supremacy Clause[45] in defining the respective spheres of federal and state authority under the Constitution. Like the Supremacy Clause, the dormant Commerce Clause protects

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[43] *Hood v. DuMond*, 336 U.S. at 533 (quoting J. Story, *The Constitution*, §§ 259, 260). The commercial disputes among the states during the Confederation period, and the likelihood that these rivalries would lead to a political division of the nation into separate confederations, were a primary factor in convincing the Founders of the need for a strong federal government with control over interstate and foreign commerce. *E.g.*, *The Federalist*, No. 7 (A. Hamilton) at 27, 29-30 (G. Wills ed. 1982) (continued state disputes over commercial regulation would likely lead to "outrages, . . . reprisals and wars"); *id.*, No. 22 (A. Hamilton) at 103-04; *id.*, No. 42 (J. Madison) at 214 (continued state conflicts in commercial regulation "would nourish increasing animosities, and not improbably terminate in serious interruptions of the public tranquility"). James Madison pointed to both the political and economic objectives of the Commerce Clause when he stated that the Clause would "maint[ain] . . . harmony and proper intercourse among the States." *Id.*, No. 41, at 203. *See also* 3 M. Farrand, ed., *The Records of the Federal Convention of 1787*, at 547-48 (1937 rev. ed.) (Madison's draft preface to his notes of the debates in the Constitutional Convention, stating that the "want of a general power over Commerce . . . engendered rival, conflicting and angry regulations" among the states).

[44] *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 223-26 (1824) (Johnson, J.); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827) (opinion for the Court by Marshall, C.J.); *Cooley*, 53 U.S. (12 How.) at 316-17 (opinion for the Court by Curtis, J.).

[45] U.S. Const. art. VI, cl. 2.

federal commercial interests by "according them priority whenever they come in conflict with state law."[46] When Congress exercises its legislative power under the Commerce Clause, that Clause and the Supremacy Clause jointly establish the priority of federal law over conflicting state rules.[47] Similarly, it has been suggested that, when this Court strikes down a state law under the dormant Commerce Clause, the Court has vindicated the supremacy of federal legislative power based on an implicit assumption that Congress would have acted if it wished to authorize the states to interfere with interstate commerce regarding the matter in question.[48]

In *Golden State* this Court unanimously concluded that the Supremacy Clause "does not create rights enforceable under § 1983," because it simply establishes the priority of valid exercises of federal power over conflicting exercises of state power within our constitutional scheme.[49] *Golden State* further held that a preemption claim does not create "rights" cognizable under § 1983 unless the preemptive federal statute *itself*, either "by its terms or as interpreted," establishes such "rights."[50] Thus, when Congress preempts state law by enacting a statute based on its Commerce Clause power, that preemption does *not* create a cause of action under § 1983 *unless* the statute itself confers "rights" on private persons.[51]

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[46] *Golden State*, 110 S.Ct. at 449 (quoting *Chapman*, 441 U.S. at 613).

[47] *E.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 196-97, 210-12, 220-21.

[48] *See, e.g.*, *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2344 (Scalia, J., concurring); *Southern Pacific*, 325 U.S. at 768 (alternative holding); *Welton*, 91 U.S. at 282; Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 3, 5-6, 19-28 (1940).

[49] 110 S.Ct. at 449. *See also id.* at 453-54 (Kennedy, J., dissenting).

[50] *Id.* at 449.

[51] *See id.* at 450 ("when congressional pre-emption benefits particular parties only as an incident of the federal scheme of regulation, a

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Therefore, it would be anomalous to conclude that a preemptive invalidation of state law under the *dormant* Commerce Clause automatically results in the creation of § 1983 "rights" in the face of congressional *silence*.[52]

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private damages remedy under § 1983 may not be available"). *Cf. California v. Sierra Club*, 451 U.S. 287, 292-98 (1981) (River and Harbors Appropriation Act of 1899 "was designed to benefit the public at large" and was not enacted "for the especial benefit of a particular class"; therefore, the Act did not grant any implied "rights" to aggrieved private individuals to obtain a federal remedy for alleged violations of the Act).

[52] Petitioner Dennis and *amicus* American Trucking Associations, Inc. ("ATA") point out (Pet. Br. 25-26 n.18; ATA Br. 6 n.2) that *Golden State* found a cognizable § 1983 "right" based on a judicial interpretation of the National Labor Relations Act ("NLRA") which barred federal or state interference in collective bargaining. *Golden State* concluded that the judicial interpretation created a § 1983 "right" even though the interpretation was "not expressly set forth in the text of the statute." 110 S.Ct. at 451. However, the Court made clear in *Golden State* that this interpretation was based on the NLRA's clear purpose to protect "certain rights of labor and management against governmental interference." *Id.* The interpretation created a "right" cognizable under § 1983 because it "denies either [the federal or state] sovereign the authority to abridge a personal liberty." *Id.* at 452. Thus, the holding in *Golden State* was based upon the Court's identification of a statutory purpose to protect "a personal liberty."

The Court also indicated in *Golden State* that a *different* result under § 1983 might be called for in a case involving a judicial "pre-emption rule" which is simply "designed . . . to answer the question whether state or federal regulations should apply to certain conduct." The Court indicated that such a rule might well fall *outside* the scope of § 1983, because it is not "a guarantee of freedom for private conduct that the State may not abridge." *Id.* at 451-52. As shown *infra* at notes 61-68 and accompanying text, the dormant Commerce Clause functions in much the same way as a "judicial pre-emption rule," and it does not guarantee individual "rights" within the scope of § 1983.

2. The Dormant Commerce Clause Does Not Secure any "Right" to Individual Participants in the Interstate Market Within the Meaning of § 1983.

a. The Commerce Clause Protects the Interstate Market, Not Individual Market Participants.

As this Court's decisions have recognized, the Commerce Clause is designed to protect the general public interest in the proper functioning of the interstate market, rather than the particular economic interests of individual participants in that market. Thus, the Court has declared that the Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."[53] Similarly, the Court has said that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."[54] Perhaps most telling is the Court's statement that the Commerce Clause "protects interstate commerce" while, in contrast, the Equal Protection Clause of the

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[53] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (upholding Minnesota law banning the sale of milk products in nonreturnable plastic containers, notwithstanding evidence that the law favored in-state pulpwood producers and harmed out-of-state plastics producers); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (sustaining Maryland law prohibiting producers and refiners of gasoline from operating retail service stations within the state, even though the law's impact fell exclusively on out-of-state entities).

[54] *CTS Corp.*, 481 U.S. at 88 (upholding Indiana law regulating corporate takeovers even though the law's burden was claimed to fall primarily on out-of-state bidders); *Exxon*, 437 U.S. at 126.

Fourteenth Amendment "protects persons from unconstitutional discrimination by the States."[55]

This Court has also pointed out that the Commerce Clause does not protect interstate market participants from all state taxes. Rather, the Clause requires only that "[state] revenue measures maintain state boundaries as a neutral factor in economic decisionmaking."[56] Thus, the "adverse economic impact in dollars and cents upon a participant in interstate commerce for crossing a state boundary and thus becoming subject to another State's taxing jurisdiction is neither necessary to establish a Commerce Clause violation . . . *nor sufficient*."[57] In short, the clear purpose of the Commerce Clause is to protect the interstate market *as a whole* from discriminatory state burdens (including discriminatory state taxes), and the particular economic interests of individual market participants are incidental, or even irrelevant, to that objective.

Individual market participants and consumers do receive an indirect and incidental benefit from the fact that the Commerce Clause generally creates "an area of free trade among the several States."[58] As already shown, this benefit is

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[55] *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985).

[56] *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 283 (1987).

[57] *Id.* at 283-84 n.15 (emphasis added; citations omitted).

[58] *Boston Stock Exchange*, 429 U.S. at 328 (quoting *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). *See also id.* at 329. For other decisions recognizing that market producers and consumers receive an indirect and incidental benefit from the "federal free trade unit" created by the Commerce Clause, *see, e.g., Hood v. DuMond*, 336 U.S. at 538-39; *Scheiner*, 483 U.S. at 280-84. The Founders themselves recognized that federal regulation of commerce would benefit producers and consumers by fostering free trade. However, the benefit to these persons was plainly incidental to the Founders' principal purpose of preserving national political and economic union. *See, e.g., The Federalist*, No. 22 (A. Hamilton) at 104 (G. Wills ed. 1982); *id.*, No. 42 (J. Madison) at 214.

entirely incidental to the Clause's basic purpose of preserving national political and economic union. Moreover, this benefit is subject to qualification or removal at the pleasure of Congress and, therefore, is not an individual "right" cognizable under § 1983. For example, Congress may constitutionally decide to prohibit all persons from engaging in a particular line of interstate commerce.[59] In the alternative, Congress may constitutionally authorize the states to enact prohibitory or discriminatory laws affecting a line of interstate commerce.[60] Thus, the only "interest" of an interstate market participant under the dormant Commerce Clause is to conduct his business free from discriminatory state rules, provided that Congress does not prohibit or discriminate against his business and further provided that Congress does not authorize the states to do so. To describe a market participant's "interest" under the Commerce Clause in such equivocal and hedged terms is to demonstrate that the dormant Commerce Clause does not create "rights" within the meaning of § 1983.

In *Golden State*, this Court suggested that a "right" for purposes of § 1983 involves "a guarantee of freedom for private conduct that the State may not abridge."[61] In addition, as shown above, *Golden State* and other decisions demonstrate that an entitlement creates "rights" cognizable under § 1983 only if it is intended to guarantee specific and definite benefits to the plaintiff that he can enforce as obligations binding on a state governmental unit.[62] The dormant Commerce Clause does not create any "rights" under § 1983, because it is designed for the general purpose of preserving national political and economic union, and the incidental benefits it provides to market participants can be qualified or

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[59] *E.g., United States v. Darby*, 312 U.S. 100, 113-15 (1941).

[60] *E.g., Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174-75 (1985).

[61] 110 S.Ct. at 452.

[62] *See supra* Argument, Part I(A).

abrogated either by Congress or by the states acting under congressional authority. The Commerce Clause is clearly far different in nature from constitutional provisions containing specific guarantees of individual benefits which have been held to create "rights" under § 1983.[63]

In *Golden State* this Court indicated that a "pre-emption rule" does *not* create "rights" cognizable under § 1983 if it simply allocates power between the federal and state governments by "answer[ing] the question whether state or federal regulation should apply to certain conduct."[64] As shown above, the Commerce Clause is designed to perform precisely this function of allocating power between the federal and state governments,[65] and it is fundamentally different from

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[63] *See, e.g., Smith v. Robinson*, 468 U.S. 992, 1007-09 (1984) (individual guarantees created by the Due Process and Equal Protection Clauses of the Fourteenth Amendment are cognizable under § 1983). Constitutional provisions that guarantee individual rights typically do not permit Congress to remove these benefits or else place explicit limits on the power of Congress to do so. *E.g.*, U.S. Const. art. I, § 9, cl. 2 (providing that the writ of habeas corpus "shall not be suspended," except "in Cases of Rebellion or Invasion the public Safety may require it"); *id.*, cl. 3 ("[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress); *id.* amend. I ("Congress shall make no law" establishing religion or prohibiting the free exercise thereof, abridging the freedom of speech or the press or the right of the people peaceably to assemble and petition the Government); *id.* amend. III (no soldier may be quartered in any house without the owner's consent, except in wartime "in a manner to be prescribed by law"). In contrast, the Commerce Clause contains no express guarantee of benefits to individuals and places no limits on the power of Congress either to restrict or prohibit interstate commerce or to authorize the states to do so. *See supra* notes 58-62 and accompanying text.

[64] 110 S.Ct. at 451 n.7, 451-52. *See also id.* at 453-55 (Kennedy, J., dissenting).

[65] *See supra* Argument, Part I(B)(1).

other constitutional provisions that guarantee individual rights.[66] As a leading commentator has remarked,

> . . . when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type . . . is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the Constitution has been violated, he implicitly concedes that one of the two levels of government – national or state – has power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one.[67]

In light of this Court's reasoning in *Golden State*, a constitutional provision or doctrine that allocates power between the federal and state governments does not create "rights" cognizable under § 1983 unless it is *also* intended to guarantee specific and definite benefits to particular persons

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[66] *See supra* note 63 and accompanying text.

[67] J. Choper, *Judicial Review and the National Political Process* 174-75 (1980). *See also* Collins, *supra* note 28, at 1550 ("judicial enforcement of [the dormant Commerce Clause] at the behest of private parties no more secures an individual right for the purposes of § 1983 than it does in the context of the supremacy clause, or other provisions that allocate power between the states and the federal government"); Dowling, *supra* note 48, at 22-23 (litigation under the dormant Commerce Clause "is between private parties, but the issues touch the relative jurisdiction of nation and state").

that can be enforced against the states.[68] The Commerce Clause is not designed to ensure such individual benefits in either its active or dormant version, and therefore it does not secure "rights" within the scope of § 1983.

b. Petitioner's Mere Standing to Sue Based on a Violation of the Dormant Commerce Clause Does Not Establish any "Right" Cognizable under § 1983.

In asserting that the Commerce Clause creates "rights" cognizable under § 1983, Dennis strongly relies on two cases holding that persons who are adversely affected by violations of the dormant Commerce Clause have standing to challenge those violations.[69] Neither of those cases involved any claim under § 1983. Moreover, it is clear that mere standing to bring a claim under the dormant Commerce Clause is *not* equivalent to a "right" secured by the Constitution within the meaning of § 1983.

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[68] Dennis and ATA rely on a decision holding that an aggrieved taxpayer had standing to challenge a state tax that violated the intergovernmental tax immunity doctrine (*Davis v. Michigan Dept. of Treasury*, 109 S.Ct. 1500, 1507 (1989)), and other decisions holding that the bicameralism and separation of powers provisions in the Constitution protect individual liberties (*e.g., United States v. Munoz-Flores*, 110 S.Ct. 1964, 1970 (1990); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)). *See* Pet. Br. 26-29; ATA Br. 17-18. None of these cases involved a claim under § 1983; indeed, *Munoz-Flores* and *Synar* involved actions by *federal* officials, which cannot be challenged under § 1983. Moreover, none of these cases addressed the question of whether the dormant Commerce Clause is intended to secure individual "rights" protected under § 1983 as well as allocating power between the federal and state governments.

[69] *Boston Stock Exchange*, 429 U.S. at 320 n.3; *Morgan v. Virginia*, 328 U.S. 373, 376-77 (1946).

At least since the companion cases of *Scott v. Donald*,[70] this Court has reviewed cases involving claims for violation of the dormant Commerce Clause brought in federal court under federal question jurisdiction.[71] The scope of federal question jurisdiction under 28 U.S.C. § 1331, originally enacted in 1875,[72] is significantly broader than the scope of the federal remedy created by § 1983. Section 1331 establishes federal question jurisdiction over "all civil actions *arising under* the Constitution, laws or treaties of the United States,"[73] while § 1983 provides a remedy only for deprivations of "rights, privileges, or immunities *secured by* the Constitution and laws."[74]

This Court highlighted the difference between the broad "arising under" language of § 1331 and the narrower "rights . . . secured by" language of § 1983 in the *Virginia Coupon*

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[70] 165 U.S. 58 (1897); 165 U.S. 107 (1897). Prior to the creation of federal question jurisdiction in 1875, dormant Commerce Clause claims were brought exclusively in state court and reached this Court on review from state court decisions. *E.g., Gibbons*, 22 U.S. (9 Wheat.) at 1-3; *Cooley*, 53 U.S. (12 How.) at 311. As shown by both the present case and *Scheiner*, 483 U.S. at 269, many dormant Commerce Clause cases (particularly in the area of state taxation) continue to be litigated in state court with opportunity for review by this Court.

[71] *See* Collins, *supra* note 28, at 1509, 1520-21. For more recent examples of dormant Commerce Clause claims litigated under federal question jurisdiction, *see, e.g., Baldwin*, 294 U.S. at 520-21; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 339-40, 346-48 (1977). In *Hunt*, the plaintiff asserted both federal question jurisdiction under 28 U.S.C. § 1331 and federal jurisdiction to remedy civil rights violations under 28 U.S.C. § 1343, the jurisdictional counterpart of § 1983. However, the district court in *Hunt* specifically relied on § 1331 and declined to rule on whether jurisdiction would be available under § 1343. *See* 432 U.S. at 339-40 and n.4.

[72] *See* Collins, *supra* note 28, at 1497.

[73] 28 U.S.C. § 1331 (emphasis added).

[74] 42 U.S.C. § 1983 (emphasis added).

Cases, 114 U.S. 269 (1885), which were decided not long after the enactment of both statutes. In those cases, the Court held that actions challenging a Virginia state law under the Contracts Clause came within federal question jurisdiction under § 1331,[75] but did *not* establish a cause of action within the scope of § 1983.[76] The Virginia law in question repealed an earlier state statute that had permitted the payment of taxes in coupons cut from state bonds.

In one of these coupon cases, *Carter v. Greenhow*, the Court held that, although the challenge to Virginia's law based on the Contracts Clause stated a claim "arising under" the Constitution, the plaintiff taxpayer had not been deprived of any "right" secured to him by the Constitution within the meaning of § 1983. In the Court's view, the plaintiff's asserted "right to pay his taxes in coupons" and his claimed "immunity from further [state] proceedings to collect such taxes" were not "directly secured by the Constitution." Instead, the Court found that the "only right secured" to the plaintiff by the Contracts Clause was his entitlement to a "judicial determination" nullifying the Virginia statute, and the Court concluded that Virginia had not deprived the plaintiff of his right to judicial relief.[77]

This Court need not decide whether it would now reaffirm its holding in *Carter* that the Contracts Clause does not secure "rights" (except to obtain judicial process and relief) within the scope of § 1983. The critical holding in *Carter*,

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[75] *White v. Greenhow*, 114 U.S. 307, 308 (1885); *Allen v. Baltimore & Ohio R.R.*, 114 U.S. 311, 316 (1885).

[76] *Carter v. Greenhow*, 114 U.S. 317, 321-23 (1885); *Pleasants v. Greenhow*, 114 U.S. 323, 324 (1885).

[77] 114 U.S. at 322. The plaintiff in *Carter* sought to bring his claim under the jurisdictional counterpart to § 1983, which did not require a minimum amount in controversy, because he could not satisfy the $500 jurisdictional minimum then in effect under the federal question statute. *See* 114 U.S. at 320, 322-23.

which remains valid today, is that mere standing to bring a federal question action under § 1331 does not constitute a "right" cognizable under § 1983.[78] This latter holding is particularly noteworthy in view of the relatively short period of time between the enactment of §§ 1331 and 1983 and the decision in *Carter*.

The distinction drawn in *Carter* between § 1331 and § 1983 was reiterated in another 1885 decision, *Bowman v. Chicago & Northwestern Ry.*,[79] a case involving the Commerce Clause. In *Bowman*, the plaintiffs sought to recover damages resulting from the defendant railroad's refusal to transport a shipment of beer from Illinois to Iowa. The railroad relied on an Iowa law that prohibited the shipment of beer into the state without a proper certificate. The plaintiffs alleged that the Iowa law was invalid because it deprived them of their constitutional "right" to ship goods in interstate

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[78] ATA contends, based on Justice Stone's dictum in *Hague v. CIO*, 307 U.S. 496, 527 (1939), *quoted in Chapman*, 441 U.S. at 613 n.29, that *Carter* was decided merely as "a matter of pleading." ATA Br. 11-12. This reading of *Carter* is clearly "strained" (Collins, *supra* note 28, at 1535 n.221) in view of the careful distinction made by the Court in *Carter* between the plaintiff's "right" to obtain a judicial invalidation of the Virginia law and the lack of any "right" under § 1983 to enforce his contractual claim to pay Virginia taxes in coupons.

In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 n.6 (1972), the Court stated that *Carter* and *Pleasants* were "governed by unique considerations" because they involved "judicial interference with the enforcement of state tax laws." It is true that *Carter* and *Pleasants*, like the present case, involved the validity of state tax laws. However, the holding in these cases as to the availability of relief under § 1983 was not expressly limited to cases involving state taxes.

[79] 115 U.S. 611 (1885).

commerce,[80] and they sought review in this Court based on a jurisdictional counterpart to § 1983.[81]

The Court in *Bowman* held that it had no jurisdiction to review plaintiffs' claim. Although the claim might be one "arising under the Constitution," plaintiffs had not shown "the deprivation of a right, privilege or immunity secured by the Constitution."[82] The Court held that the plaintiffs' asserted "right" to ship goods in interstate commerce was based only on a "principle of general law," since the Constitution itself did *not* require the railroad to ship plaintiffs' beer. Instead, the Constitution was relevant only indirectly in determining whether the Iowa statute was valid and thereby excused the railroad from its duty under "general law" to carry plaintiffs' goods. Accordingly, the Court concluded that plaintiffs' asserted "right" was *not* "secured by the Constitution."[83]

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[80] The opinion in *Bowman* does not specifically refer to the Commerce Clause, but it is evident from the facts of the case that the Commerce Clause was the only constitutional provision on which the plaintiffs could have relied. *See* 115 U.S. at 612-15; Collins, *supra* note 28, at 1520 & n.148, 1551 & n.297.

[81] The plaintiffs relied on Rev. Stat. § 699(4), which granted to the Supreme Court jurisdiction, without regard to the amount in controversy, to review any federal court judgment or decree in a case alleging "the deprivation of any right, privilege, or immunity secured by the Constitution." The plaintiffs sought such review because they could not show the minimum amount in controversy required for federal question jurisdiction. *See Bowman*, 115 U.S. at 613-15; *cf. Maine v. Thiboutot*, 448 U.S. 1, 16 n.2 (1980) (Powell, J., dissenting) (discussing Rev. Stat. § 699(4)).

[82] 115 U.S. at 615-16.

[83] *Id.* at 615. In holding that plaintiffs' claimed entitlement was not a "right . . . secured by the Constitution," but was instead "a right existing without [*i.e.*, outside] the Constitution" (*id.*), the Court in *Bowman* reached the same conclusion that Chief Justice Marshall and Justice Johnson had previously expressed in *Gibbons v. Ogden*. In *Gibbons*, both Marshall and Johnson acknowledged, based on natural law principles, that

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Bowman and *Carter* demonstrate that claims by private parties under the dormant Commerce Clause do not involve "rights . . . secured by the Constitution" within the meaning of § 1983, even though such parties have standing to maintain a suit based on federal question jurisdiction. A dormant Commerce Clause claim "aris[es] under the Constitution" for purposes of § 1331, because the claim calls into question the validity of a state law under the Constitution. Under the federal doctrine of standing, a person adversely affected by an unconstitutional state law is deemed to have standing to challenge that law.[84] However, the dormant Commerce Clause does not "secure" any "rights" for purposes of § 1983, because the entitlement of an individual to engage in interstate commerce is not based on the Commerce Clause and is,

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each person had a "right" *outside of the Constitution* (*i.e.*, in the state of nature) to engage in commerce. Justice Johnson pointed out, however, that this natural "right" became subject to the "supreme . . . power," first of the sovereign states under their own constitutions and later of the sovereign federal government under the federal Constitution, "to limit and restrain [commerce] at pleasure." *Gibbons*, 22 U.S. (9 Wheat.) at 227. Similarly, Chief Justice Marshall declared that the federal Constitution had granted to Congress the "complete," "plenary" and "supreme" power to regulate the natural "right" of commerce which was "existing" when the Constitution was ratified. *Id.* at 196-97, 211.

Thus, Dennis and ATA are clearly wrong in suggesting that *Gibbons* recognized an individual "right" to engage in interstate commerce *based on the Constitution itself*. Pet. Br. 19-20; ATA Br. 18. It is plain that the "right" identified by Chief Justice Marshall and Justice Johnson was based on natural law principles existing outside of the Constitution, and that both Justices considered this "right" to have been completely subordinated to the power of Congress under the Commerce Clause.

[84] *See Boston Stock Exchange*, 429 U.S. at 320 n.3 (person adversely affected by discriminatory state tax had standing to assert dormant Commerce Clause claim, because that person had shown sufficient "injury in fact" and was "arguably within the zone of interests to be protected" by the Commerce Clause).

in fact, subject to the plenary power of Congress to prohibit or restrict interstate commerce under that Clause.[85]

In addition, the standard for identifying "rights" cognizable under § 1983 is far more exacting than the "zone of interests" test applied in standing cases. To establish standing, a plaintiff need only show that his claim is "*arguably* within the zone of interests to be protected by the statute or constitutional guarantee in question."[86] This "test is not meant to be especially demanding," and "there need be no indication of congressional purpose to benefit the would-be plaintiff."[87] All that the plaintiff must show is a "plausible relationship" between his asserted interest and the policies to be advanced by the relevant constitutional or statutory provision.[88]

In contrast, as shown above, a constitutional or statutory provision does not create "rights" cognizable under § 1983 unless it is designed to confer specific and definite benefits on particular persons that can be enforced against the states.[89] Thus, unlike the liberal test of standing, the controlling standard under § 1983 requires an explicit constitutional or statutory purpose to guarantee specific and enforceable benefits. It therefore is clear that Dennis' mere standing to assert a

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[85] *See supra* Argument, Part I(B)(2)(a). *See also Connor v. Rivers*, 25 F. Supp. 937, 938 (N.D. Ga. 1938) (three-judge court) (holding that challenge to Georgia statute based on the dormant Commerce Clause could not be heard under the jurisdictional counterpart of § 1983, because there was "no claim or evidence that said Georgia Statute deprives the petitioner 'of any right, privilege, or immunity secured by the Constitution'"), *aff'd per curiam*, 305 U.S. 576 (1939).

[86] *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396 (1987) (emphasis added) (quoting *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

[87] *Id.* at 399-400.

[88] *Id.* at 403.

[89] *See supra* Argument, Part I(A).

federal claim under the dormant Commerce Clause does not constitute a "right" cognizable under § 1983.[90]

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[90] In addition to *Boston Stock Exchange* and *Morgan*, which simply affirmed the standing of private parties to assert dormant Commerce Clause claims, Dennis and ATA assert that several other cases have recognized a "right" to engage in interstate commerce. Pet. Br. 20-21; ATA Br. 15-16, 18. None of these cases, however, presented a claim under § 1983. *Garrity v. New Jersey*, 385 U.S. 493 (1967), involved the privilege against self-incrimination secured against state interference under the Fourteenth Amendment. As noted by the court below, the reference in *Garrity* (385 U.S. at 500) to a "right" to engage in interstate commerce was "mere dictum." Pet. Cert. App. 7a (quoting *Kassel*, 730 F.2d at 1145).

In addition, contrary to the suggestion of ATA, *United States v. Guest*, 383 U.S. 745 (1966) did *not* specifically base the constitutional right to travel on the Commerce Clause. The Court in *Guest* recognized that state statutes interfering with the interstate transportation of persons had been struck down under the Commerce Clause in cases such as *Edwards v. California*, 314 U.S. 160 (1941). But in *Guest* and subsequent cases, the Court declined to locate the right to travel in any specific provision of the Constitution. *Guest*, 385 U.S. at 757-59; *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902-03 (1986) (plurality opinion).

Dennis and ATA also rely on references to a "right" to engage in interstate commerce in *Crutcher v. Kentucky*, 141 U.S. 47, 57 (1891), and *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 21, 48 (1910). However, as indicated by the court below, it appears that both decisions were primarily concerned with "the separation of powers between the national and state legislatures." Pet. Cert. App. 7a-8a (quoting *Kassel*, 730 F.2d at 1145). Both *Crutcher* and *Western Union* held that state interference with interstate commerce is unlawful because the "power of Congress over interstate commerce is as absolute as it is over foreign commerce," and, therefore, "the matter is not within the province of state legislation, but within that of national legislation." *Crutcher*, 141 U.S. at 57, *quoted in Western Union*, 216 U.S. at 21. In addition, to the extent that *Crutcher* and *Western Union* were read to suggest that the Commerce Clause establishes an individual constitutional "right" to engage in interstate

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It should also be noted that the standing of private parties to bring claims under the dormant Commerce Clause is only indirect and derivative. As shown above, the fundamental purpose of the Commerce Clause is to preserve national political and economic union,[91] and the Clause is not designed to protect the individual rights of market participants.[92] Market participants are only "indirect" beneficiaries of the Commerce Clause,[93] and in bringing suit they act merely as "surrogates" for the national interests protected by the Clause.[94] In sum, the derivative standing of market participants to assert the national interests served by federal regulatory power over interstate commerce does not rise to the level of a guaranteed individual "right" protected under § 1983.

3. The Legislative History of § 1983 Shows that Congress Did Not Intend to Create a Remedy Thereunder for Violations of the Dormant Commerce Clause.

The legislative history of the Civil Rights Act of 1871 demonstrates that Congress did not intend to provide a remedy under § 1983 for violations of the dormant Commerce Clause or other constitutional provisions allocating power between the federal and state governments. As described

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commerce, such a reading would be completely inconsistent with *Gibbons* and *Bowman*. *See* supra note 83 and accompanying text.

Thus, none of the cases relied on by Dennis and ATA prove their contention that this Court has recognized a "right" under the Commerce Clause that is of the same nature as "rights" cognizable under § 1983.

[91] *See supra* Argument, Part I(B)(1).

[92] *See supra* Argument, Part I(B)(2)(a).

[93] *Kassel*, 730 F.2d at 1145.

[94] Collins, *supra* note 28, at 46. *See also* J. Choper, *supra* note 67, at 174-75; Dowling, *supra* note 48, at 22-23.

above, the primary focus of § 1983, and the 1871 Act generally, was to provide additional federal remedies to protect the individual rights guaranteed by the Civil War Amendments.[95] Moreover, in explaining the scope of the 1871 Act, the Act's supporters drew a clear distinction between constitutional provisions guaranteeing individual rights, which *would* come within the scope of the Act's protections, and constitutional provisions establishing the basic structure of federalism, which would *not* be affected by the Act.

Representative Shellabarger, the House sponsor and floor manager of the 1871 Act,[96] explained this distinction in a floor speech that has been frequently cited in cases construing § 1983.[97] Shellabarger made his comments in the course of discussing the original House version of Section 2 of the 1871 Act. However, his remarks had a direct relevance to Section 1 (*i.e.*, § 1983), because they dealt with the scope of the "rights, privileges, or immunities" that would be protected under Section 2.[98] Shellabarger first contended that Congress had

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[95] *See supra* notes 28-33 and accompanying text.

[96] *See supra* note 29 and accompanying text.

[97] *E.g.*, *Monell*, 436 U.S. at 670-71; *Golden State*, 110 S.Ct. at 454 (Kennedy, J., dissenting); *Kassel*, 730 F.2d at 1146 n.16.

[98] The original House version of Section 2 would have created criminal penalties for any private conspiracy "to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States," provided that the act would constitute any of several specified federal felonies (*e.g.*, murder, manslaughter, assault and battery, criminal obstruction of legal process) if it were committed in a place under federal jurisdiction. *Monroe v. Pape*, 365 U.S. at 180-81. Section 2 was strongly criticized, even by some supporters of the 1871 Act, as an unwarranted extension of federal authority into matters traditionally governed by state criminal law. Accordingly, the scope of Section 2 was narrowed substantially prior to its enactment. *See, e.g., Scott*, 463 U.S. at 834-35; *Griffin v. Breckenridge*, 403 U.S. 88, 99-102 (1971); *Monroe v. Pape*, 365 U.S. at 180-81.

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power to "protect those rights of American citizenship so solicitously and so abundantly guarded and guarantied and made eternal as the Constitution itself."[99] He then reviewed the original Constitution and distinguished the provisions dividing federal and state powers from the provisions guaranteeing individual rights:

> Most of the provisions of the Constitution which restrain and directly relate to the States . . . relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers . . . . But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.
>
> These three are: first, that as to fugitives from Justice [Art. IV, § 2, cl. 2]; second, that as to fugitives from service, (or slaves;) [Art. IV, § 2, cl. 3] third, that declaring that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" [Art. IV, § 2, cl. 1].

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Notwithstanding the different remedies provided by Sections 1 and 2 of the 1871 Act, the basic purpose was the same for Section 2 as it was for Section 1 – *i.e.*, to protect the federal "rights, privileges, [and] immunities" of citizens. Moreover, the close relationship of the two sections is indicated by the fact that, after Shellabarger completed his explanation of Section 2, he stated: "Here, gentlemen, I leave *the first and the second sections* of this bill." Cong. Globe App. 70 (emphasis added).

[99] Cong. Globe App. 69.

> And, sir, every one of these . . . the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for, Congress has by legislation affirmatively interfered to protect or subject such persons.[100]

Thus, Shellabarger considered that constitutional provisions "divi[ding] the political powers of the State and General Governments" did *not* "relate directly to the rights of persons within the States." In contrast, he believed that the 1871 Act, like earlier federal laws protecting individual rights, would enforce those constitutional provisions that *did* "secur[e] the rights . . . of persons within the States, as between such persons and the States."[101] Shellabarger's comments plainly indicate that he would *not* have considered the Commerce Clause to be a source of any "rights" cognizable under § 1983.[102]

Contrary to the assertion of Dennis and ATA that Shellabarger's comments are merely a "fragment[] of legislative

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[100] Cong. Globe App. 69-70.

[101] *Id.* at 69. Shellabarger made an ironic reference to the 1793 federal fugitive slave law, enacted to secure the rights of slaveowners under Article IV, § 2, cl. 3, which had been upheld in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). Shellabarger declared:

> [S]hall it be endured now that those decisions which were invoked and sustained in favor of bondage shall be stricken down when first called upon and invoked in behalf of human rights and American citizenship? No, Mr. Speaker, no; I appeal to them . . . as authorizing affirmative legislation in protection of the rights of citizenship under Federal law, since now these rights of citizenship are brought by the fourteenth amendment, under the care of the Constitution itself, as to all citizens.

Cong. Globe App. 70.

[102] *See Kassel*, 730 F.2d at 1146 n.16.

history,"[103] in fact other supporters of § 1983 drew the same distinction between power-allocating provisions and rights-granting provisions of the Constitution. For example, Representative Hoar stated:

> The object of the Constitution of the United States is twofold:
>
> *First*. To concentrate the strength of the whole people and provide for uniform expression of its will, for the protection and regulation of commercial intercourse, domestic and foreign.
>
> *Second*. To secure the blessings of liberty and promote the general welfare by prohibiting the States from doing what is inconsistent with civil liberty, and compelling them to do what is essential to its maintenance.[104]

Hoar stated that the 1871 Act was designed to enforce constitutional provisions providing for "the protection of personal liberties and civil rights," as contrasted with provisions

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[103] Pet. Br. 34 (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982)); ATA Br. 10 (same).

Even if Shellabarger's comments stood alone, which they do not, they would be entitled to substantial weight because they represent the detailed explanation of the principal sponsor of the legislation. His comments take on additional weight because there is no published House or Senate committee report explaining § 1983 (*see Monell*, 436 U.S. at 665-87). *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982). Moreover, contrary to the claims of Dennis and ATA, Shellabarger's comments about the scope of "rights" protected by § 1983 do not contradict the statutory language. The term "rights" is not defined in § 1983. Dennis and ATA simply assume the answer to the question that Shellabarger was addressing (*viz.*, whether the Commerce Clause or other constitutional provisions allocating state and federal powers do in fact create "rights" cognizable under § 1983). *See* Pet. Br. 33-34; ATA Br. 5-6, 10-11.

[104] Cong. Globe 333.

securing "[t]he protection of commerce."[105] Similarly, Senator Trumbull distinguished between those constitutional provisions "establishing a nation with national authority," including "authority . . . to regulate commerce," and those provisions providing for "the protection of the individual citizen."[106] Trumbull indicated that the basic purpose of the 1871 Act was to enforce the Fourteenth Amendment by preventing the states from denying due process and equal protection to their citizens.[107]

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[105] *Id.* (identifying U.S. Const. art. IV, § 4, guaranteeing to each state a republican form of government, as a provision "for the protection of personal liberty and civil rights"). Hoar was a leading Republican member of the House and served as a member of the House judiciary committee. *See* 5 *Dictionary of American Biography* 87 (D. Malone ed. 1961); *Monroe v. Pape*, 365 U.S. at 177, 182-83.

[106] Cong. Globe 575 (identifying the Privileges and Immunities Clause of Art. IV, § 2, cl. 1 as a provision for "the protection of the individual citizen").

The distinction made by Shellabarger, Hoar and Trumbull between power-allocating provisions and rights-granting provisions of the Constitution was consistent with the moderate nature of the Republicans' Reconstruction program. The Republicans intended to establish federal guarantees for fundamental civil and political rights, and to ensure equal protection of the laws for all citizens, by adopting the Civil War Amendments and implementing legislation. However, the Republicans did not intend to change the basic structure of federalism or to alter the basic distribution of powers between the federal and state governments. *See, e.g., Developments in the Law-Section 1983 and Federalism, supra* note 28, at 1141-56; W. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 7-10, 113-23, 163-64 (1988).

[107] *Id.* at 578-79. Trumbull had been the leading Senate sponsor of the Thirteenth Amendment and the Civil Rights Act of 1866, and he was a member of the moderate wing of the Republican Party in 1871. He generally supported the 1871 Act, although he opposed Senator Sherman's unsuccessful amendment that sought to impose liability on municipalities if they failed to prevent riots that deprived citizens of their federal

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In sum, proponents of the 1871 Act emphasized that § 1983 was intended to provide a federal remedy to enforce constitutional provisions guaranteeing the rights of individual citizens. The proponents also plainly indicated that they did *not* view provisions allocating power between the federal and state governments as sources of individual rights to be protected under § 1983.[108] The legislative history thus manifests

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rights. *See* Cong. Globe 579, 758-59; 10 *Dictionary of American Biography* 19-20 (D. Malone ed. 1964). *See also Monell*, 436 U.S. at 665-83 (reviewing history of Sherman amendment).

[108] The supporters of § 1983 did not entirely agree on the scope of constitutional rights that would be protected by § 1983. Representatives Shellabarger and Hoar and Senator Boreman argued (Cong. Globe App. 69, 228-29; Cong. Globe 334) that the rights protected under § 1983 would include all of the natural rights identified by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823), as protected under the Privileges and Immunities Clause of Art. IV, § 2, cl. 1. However, Justice Washington's expansive view of Art. IV, § 2, cl. 1, and its possible application to the Privileges and Immunities Clause of the Fourteenth Amendment, were both rejected in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-78 (1873). *See* L. Tribe, *supra* note 39, §§ 6-34 & 7-2 at 529-30, 550-53.

Other supporters of § 1983 rejected *Corfield v. Coryell* as an accurate definition of the rights protected under Section 1983. Cong. Globe App. 84 (remarks of Rep. Bingham, rejecting relevance of *Corfield* and arguing that the rights protected under the Fourteenth Amendment and the 1871 Act would include the rights expressly protected by the first eight amendments to the Constitution); *id.* at 152, 314 (remarks of Reps. Garfield and Burchard, rejecting *Corfield*). Senator Trumbull contended that the Fourteenth Amendment and the 1871 Act protected only the rights to due process and equal protection of the laws. Cong. Globe 576-77, 578-79.

Notwithstanding these disagreements, it is significant that all of the constitutional provisions referred to by proponents of the 1871 Act

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a clear congressional understanding in 1871 that the Commerce Clause did *not* create "rights" cognizable under § 1983.

In 1980, Congress was again presented with the question of whether claims under the dormant Commerce Clause should be brought within the scope of § 1983. Both the House and the Senate received advice that there was a serious doubt whether claims for violation of the dormant Commerce Clause could be brought in federal court under 28 U.S.C. § 1343, the jurisdictional counterpart to § 1983.[109] Congress responded, however, *not* by amending § 1343 but instead by removing the $10,000 amount in controversy requirement from 28 U.S.C. § 1331, so that federal courts could exercise *federal question jurisdiction* over all "suits challenging the constitutionality of State laws that do not come within 28 U.S.C. § 1343."[110] This postenactment history provides

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contained specific guarantees of individual liberties. None of the proponents referred to the Commerce Clause or other provisions of the Constitution allocating federal and state powers as a source for "rights" protected under § 1983.

[109] S. Rep. No. 827, 96th Cong., 2d Sess. 5 & n.9, 14 (Exhibit A) (letter dated Oct. 13, 1977, from Prof. C. Wright to Rep. Kastenmeier); H.R. Rep. No. 1461, 96th Cong., 2d Sess. 2 n.6 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 5063, 5064 n.6; H.R. Rep. No. 893, 95th Cong., 2d Sess. 3 n.11, 8 & n.26, 18-19 (1978) (Exhibit A) (Wright letter to Kastenmeier).

With respect to claims, including those under the dormant Commerce Clause, that allege the deprivation of "rights" secured by the Constitution, the scope of the remedy provided by § 1983 is coextensive with the scope of jurisdiction authorized by 28 U.S.C. § 1343(a)(3). *Lynch*, 405 U.S. at 544 n.7.

[110] H.R. Rep. No. 893, *supra* note 109, at 8. *See* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369 (removing $10,000 amount in controversy requirement from § 1331); Collins, *supra* note 28, at 1554 and n.308 (noting that Congress amended § 1331 in 1980 "in part precisely because of doubts concerning whether § 1343(3) . . . would

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further and compelling evidence of Congress' understanding that dormant Commerce Clause claims do not assert "rights" protected by § 1983.[111]

C. Application of § 1983 to Dormant Commerce Clause Claims Would Not Further the Purposes of the Statute and Would Seriously Prejudice the Interests of State and Local Governments.

Dennis has asserted that the application of § 1983 to claims under the Commerce Clause is "extremely important to the effective enforcement" of the Clause (Pet. Cert. 12). An analysis of the nature and long history of Commerce Clause litigation, however, reveals that this assertion is unwarranted. The expansion of § 1983 into the realm of Commerce Clause litigation is not only unnecessary to insure effective enforcement of the Clause, but would also be extremely detrimental to state and local government interests.

Claims under the dormant Commerce Clause, unlike claims brought to redress violations of individual constitutional rights, are generally economic in nature and involve disputes between business interests and governmental bodies over taxes or regulatory actions. From a historical perspective, it was not until four years *after* § 1983 was enacted that private parties began to litigate Commerce Clause claims in federal court.[112] Previously, Commerce Clause claims were brought in state court and did not enter the federal system

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reach nonfourteenth amendment claims, such as dormant commerce clause actions").

[111] *See North Haven*, 456 U.S. at 535 (relying on postenactment legislative history in interpreting federal statute); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (same).

[112] *See* Act of March 3, 1875, § 1, 18 Stat. 470 (creating federal question jurisdiction), *codified as amended at* 28 U.S.C. § 1331.

until reviewed by this Court.[113] Following enactment of the federal question statute in 1875, actions involving Commerce Clause claims initiated in federal court were based on federal question jurisdiction, not § 1983 and its jurisdictional counterpart.[114] Even after the creation of federal question jurisdiction, many if not most dormant Commerce Clause cases have been brought in state courts, including the instant case, subject to the possibility of review in this Court.[115]

Thus, market participants have historically possessed sufficient opportunities and incentives to litigate Commerce Clause claims in state or federal court without resort to § 1983. The only practical reason to bring such a claim under the Civil Rights Legislation is to enhance the opportunity to

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[113] *See supra* note 70.

[114] *See* Collins, *supra* note 28, at 1507-33, 1551; *Scott v. Donald*, 165 U.S. 58, 72-73, 101 (1897) (dormant Commerce Clause claim upheld under federal question statute); *cf. Carter v. Greenhow*, 114 U.S. at 322-23 (1885) (Contracts Clause does not secure individual rights within the meaning of § 1983; Congress intended such claims to be litigated in state courts, with review by the Supreme Court, or in lower federal courts by reason of federal question jurisdiction). In some instances, Commerce Clause actions could be brought in federal court by the invocation of diversity jurisdiction. *See*, Collins, *supra* note 28, at 1508, 1527; *see, e.g., McNeill v. Southern Ry. Co.*, 202 U.S. 543, 559 (1906).

[115] *E.g., Hood v. DuMond*, 336 U.S. at 529; *Exxon*, 437 U.S. at 121-24; *Scheiner*, 483 U.S. at 269. Dennis was precluded from bringing an injunctive action to challenge the tax imposed pursuant to Neb. Rev. Stat. §§ 60-305.02 and 60-305.03 (Reissue 1984) in federal court by the Tax Injunction Act, 28 U.S.C. § 1341 (1982). Even prior to the enactment of § 1341 in 1937, this Court applied the principle of comity in adopting a policy of federal court restraint in actions involving state taxes, based on the traditional equitable doctrine that courts of equity will not act when remedies at law are plain, adequate, and complete. *See, e.g., Matthews v. Rodgers*, 284 U.S. 521 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). The implications of the Tax Injunction Act and these precedents are further discussed *infra* in Argument, Part II.

recover damage awards and to secure attorneys fees under § 1988.[116]

As a matter of policy, attorneys fee awards are neither necessary nor desirable in Commerce Clause litigation. If § 1983 were held to create a cause of action for claims under the Commerce Clause, any person conceivably affected by a state or local economic regulation would be encouraged to construct a claim under the Commerce Clause in order to obtain an award of attorneys fees under § 1988.[117] Such a result would undermine the Court's recognition of the general unavailability of attorneys fees under the "American Rule" governing recovery of counsel fees stated in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 271 (1975). Business interests challenging discriminatory state regulations (unlike individuals seeking redress for violations of

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[116] Dennis acknowledges the § 1983 issue raised in this case "is important principally for purposes of petitioner's entitlement to costs and attorney's fees" under § 1988. Pet. Br. 12-13. Dennis also concedes that § 1983 does not authorize Dennis to obtain damages against Nebraska or against Respondents, state officials who have acted in good faith in their official capacities. *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989). *See* Pet. Br. 13 n.7.

[117] While Dennis seeks to emphasize the particular circumstances in this case as a means to illustrate the need for applying §§ 1983 and 1988 to claimed violations of the Commerce Clause to insure "effective enforcement" of the Clause, Pet. Br. 13 n.8 and Pet. Cert. 13-15, it is necessary to look beyond these assertions to determine the broad implications of such a ruling and the detrimental effect such a conclusion would have on state and local governmental interests. The Court should not lose sight of the fact that PTCA, while dismissed as a party for lack of standing in this case, was the lead plaintiff in each of six other state court cases cited by Dennis in which reciprocal taxes such as adopted by Nebraska were challenged as violative of the Commerce Clause. Pet. Br. 5 n.3. The fact that PTCA was represented by the same counsel appearing on behalf of Petitioner in this action in each of these cases belies the notion that competent counsel will be unwilling to take on cases of this nature without the availability of § 1983.

personal rights guaranteed by the Constitution) simply do not need the economic incentive of attorneys fees to prosecute Commerce Clause claims. The imposition of attorneys fees in such cases would place an added burden on state and local governments "as a consequence of [their] good faith efforts at economic regulation."[118]

With regard to damages, while the Eleventh Amendment may protect states and state officials sued in their official

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[118] Collins, *supra* note 28, at 1566. The availability of attorneys fees under § 1988 in cases where a plaintiff has prevailed only on a pendent non-section 1983 constitutional claim further illustrates the potential for the imposition of added financial burdens on state and local governments should § 1983 actions be expanded into the arena of Commerce Clause litigation. *Cf. Maher v. Gagne*, 448 U.S. 122, 127, 132-33 and n.15 (1980) (fee recovery proper on statutory, non-civil rights claim pendent to substantial constitutional claim in a case where both statutory and constitutional claims were settled favorably to plaintiff without litigation). Moreover, if claims under the dormant Commerce Clause were cognizable under § 1983, the Court's comparatively broad interpretation of "prevailing party" under § 1988 would also expose state and local governments to attorneys' fee awards in cases where business plaintiffs challenged local or state economic regulations under the Commerce Clause and succeeded in obtaining any type of meaningful relief (*e.g.*, rescission or modification of a challenged local ordinance or state agency rule). *See Texas State Teachers Ass'n v. Garland Independent School Dist.*, 109 S.Ct. 1486, 1492 (1989) ("prevailing party" for purposes of § 1988 "must be one who has succeeded on any significant claim affording it some relief sought, either *pendente lite* or at the conclusion of the litigation"); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (plaintiff must be able to point to resolution of dispute which materially alters the parties' legal relationship in the manner Congress sought to promote under the fee statute). *See also Maine v. Thiboutot*, 448 U.S. 1, 24-25 (1980) (Powell, J., dissenting) (noting that "[t]here is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought," and, recognizing that, under the liberal rules of pendent jurisdiction, "ingenious pleaders may find ways to recover attorneys fees in almost any suit against a state defendant").

capacities from liability for damages under § 1983, *see Will v. Michigan Dept. of State Police*, 109 S.Ct. at 2309-12 and n.10 (state official sued in his or her official capacity under § 1983 can be sued only for prospective injunctive relief), local governments and individual officials would be liable to the extent regulatory schemes are by nature "custom or policy," even if such officials acted in good faith. *See Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980) (city acting pursuant to custom or policy may not claim good faith immunity); *see also Monell*, 436 U.S. at 690 n.54 (municipality not arm of the state for Eleventh Amendment purposes).[119]

Thus, the threat of damage claims for lost economic opportunity and awards of attorneys fees in Commerce Clause litigation would impose a serious financial burden on government officials and would undoubtedly have a chilling effect on their willingness to adopt innovative policies in areas such as taxation and the regulation of business activity. The extension of § 1983 to dormant Commerce Clause claims, with the potential for damage awards and recovery of litigation costs and attorneys fees under § 1988, would likely result in such claims becoming "tomorrow's cottage industry for a

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[119] While state officials sued in their official capacities may not be held liable for damages under *Will*, state officials sued in their personal capacities may be held individually liable for damages in a § 1983 action, as well as for attorneys fees under § 1988. *Kentucky v. Graham*, 473 U.S. 159, 166-171 (1985) (state official can be sued in his personal capacity under § 1983 for damages and attorneys fees, but fees awarded in a personal capacity action may not be assessed against the state government). While state officials sued in personal capacity actions may assert personal immunity defenses, *see Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity based on good faith reliance on existing law), the threat of potential personal liability would likely have an adverse effect on the willingness of state officials to undertake new or innovative regulatory actions for fear that, in hindsight, their decisions will be second-guessed and found to fall outside any immunity defense.

new class of constitutional litigants."[120] The purpose of § 1983, to provide a means to redress violations of individual rights guaranteed by the Constitution and federal laws, is not advanced by extending its provisions as a means to promote claims by business interests that are not based on constitutional or statutory guarantees. The expansion of § 1983 into the realm of Commerce Clause litigation is, therefore, unwarranted as a matter of both law and policy.[121]

II. IF THE COURT SHOULD DETERMINE THAT § 1983 PROVIDES A REMEDY FOR VIOLATIONS OF THE DORMANT COMMERCE CLAUSE, THIS ACTION SHOULD BE REMANDED TO ALLOW THE NEBRASKA STATE COURTS TO DETERMINE WHETHER THEY MUST ENTERTAIN A CLAIM UNDER § 1983 IN A CHALLENGE TO A STATE TAX.

In the event this Court holds that claims for violations of the dormant Commerce Clause are generally cognizable under

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[120] Collins, *supra* note 28, at 1566.

[121] *Amicus* ATA's criticisms of Respondents' policy arguments against extending § 1983 to Commerce Clause claims simply miss the mark. ATA mischaracterizes Respondents' position as advocating that § 1983 "should not provide a remedy for violations of 'economic' rights." ATA Br. at 20. As noted previously, the Commerce Clause does not secure *any* "rights", economic or otherwise, within the meaning of § 1983. Respondents maintain that the invocation of § 1983 (and the accompanying fee provision in § 1988) by business interests with an economic stake in challenging state or local regulation under the Commerce Clause represents an attempt to use the statute to address constitutional claims which are wholly at odds with the language of § 1983, as well as the history underlying its enactment. This position does not attempt to resurrect the "personal" versus "property" rights distinction rejected in *Lynch*, as implied by ATA. Instead, Respondents contend that the "right" claimed by Dennis and ATA, whether it is considered as a "personal" or "property" interest, simply does not exist in the Constitution.

§ 1983, Respondents submit that this action should be remanded to the Nebraska state courts to allow consideration of whether they are required to entertain jurisdiction of a claim under § 1983 in which a constitutional challenge is raised to a state tax. While Petitioner has framed the Question Presented as "[w]hether a claim that a state tax discriminates against interstate commerce in violation of the Commerce Clause and that seeks an injunction against enforcement of the tax is cognizable under 42 U.S.C. § 1983," it is evident the actual holding of the Nebraska Supreme Court addressed only the narrower issue of whether a cause of action exists under § 1983 for violations of the Commerce Clause. Because the court below held that dormant Commerce Clause claims do not establish a cause of action under § 1983, there was no need or occasion for that court to consider whether, if such a claim were cognizable, that court would nevertheless decline to entertain the § 1983 claim in this case because it involved a challenge to a state tax. Thus, because this jurisdictional issue was not presented to or addressed by courts below, this Court should remand this case, if it is found to be cognizable under § 1983, to allow the Courts below to determine whether they must entertain a claim under § 1983 in a state tax case.[122]

Taxpayer suits challenging the constitutionality of state tax statutes are not actionable in federal court. Federal courts have declined to entertain state tax challenges by virtue of a long-standing policy of federal judicial non-interference in

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[122] The Nebraska Supreme Court did note that a party who prevails on a ground other than § 1983 is entitled to attorneys fees under § 1988 if § 1983 would have been an appropriate basis for relief. Pet. Cert. App. 5a. This mere observation does not preclude remand for consideration of whether state courts are required to entertain claims under § 1983 in state tax cases, as the courts below decided only the narrow issue of the cognizability of *any* claim under § 1983 based on a violation of the Commerce Clause.

state tax matters.[123] This policy is expressly embodied in the Tax Injunction Act,[124] the Eleventh Amendment[125] and the principle of comity articulated by the Court in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981).

The Tax Injunction Act precludes federal courts from granting prospective relief - either injunctive or declaratory[126] – from allegedly unconstitutional state taxation, provided a "plain, speedy and efficient remedy" is available in state court.[127] Taxpayers are also prohibited from suing state officials in their individual capacities for damages in federal court, as a matter of comity, where the state court remedy is "plain, speedy and efficient." *McNary*, 454 U.S. at 113-14.

The Court has recognized that, as a general matter, state courts possess concurrent jurisdiction with federal courts over claims brought under § 1983.[128] The Court has, however, left

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[123] *See supra* note 115, citing 28 U.S.C. § 1341 and court decisions prior to enactment of that statute which recognized the policy of equitable restraint exercised by federal courts in state tax matters.

[124] 28 U.S.C. § 1341 (1982), which provides: "The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[125] U.S. Const. amend. XI. The Eleventh Amendment precludes federal courts from entertaining actions seeking retroactive relief against a state, and, therefore, prevents a taxpayer from asserting a § 1983 damages action in federal court against a state.

[126] *See California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

[127] The fact that a taxpayer seeks relief under § 1983 in federal court is irrelevant where state law provides a plain, speedy and efficient remedy. *Rosewall v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

[128] *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980); *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980) ("Any doubt that state courts may also entertain [§ 1983] actions was dispelled by *Martinez*").

open the question whether state courts are *required* to entertain such claims. For example, in *Martinez*, 444 U.S. at 283 n.7, the Court stated that "[w]e have never considered the question whether a State *must* entertain a claim under § 1983" (emphasis in original).[129]

The Court recently observed in *Howlett v. Rose* that "[v]irtually every State has expressly or by implication opened its courts to § 1983 actions and there are no state court systems that refuse to hear § 1983 cases."[130] However, in the special area of state taxes, several state courts have specifically refused to hear § 1983 claims.[131] In reaching this conclusion, state courts have invariably relied upon the special remedial considerations presented by congressional action in the area of state taxation by virtue of 28 U.S.C. § 1341, and the Court's decision in *McNary* recognizing the unavailability of the remedy provided under § 1983 in federal court.[132] Indeed, the Court recently recognized that the issue

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[129] *See also Thiboutout*, 448 U.S. at 3 n.1 (noting that *Martinez* had reserved the question of whether state courts must entertain § 1983 actions).

[130] 110 S.Ct. 2430, 2444 n.20 (1990) (citing Steinglass, *Section 1983 Litigation in State Courts* 1-3 and App.E. (1989)).

[131] The Court's recent observation in *Howlett*, 110 S.Ct. at 2444 n.20, that "there are no state court systems that refuse to hear § 1983 cases" is therefore incorrect to the extent it is construed to indicate all states have consistently entertained § 1983 actions in cases involving challenges to state taxes.

[132] *Backus v. Chilivis*, 236 Ga. 500, 505, 224 S.E.2d 370, 374 (1976) (taxpayer may not circumvent state procedures by asserting § 1983 claim); *State Tax Comm'n v. Fondren*, 387 So.2d 712, 723 (Miss. 1980) (en banc) (because § 1983 claim challenging state tax laws may not be litigated in federal court, it likewise may not be litigated in state court), *cert. denied*, 450 U.S. 1040 (1981); *Stufflebaum v. Panethiere*, 691 S.W.2d 271, 272 (Mo. 1985) (en banc) (§ 1983 claim challenging state tax is improper where state law provides plain, adequate, and complete

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of whether state courts *must* assume jurisdiction under § 1983 in challenges to the imposition of state taxes was "not entirely clear." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987). In *Ragland*, the Court deemed it appropriate to remand this issue to the state court to consider whether it was required to hear such a claim. *Id.* at 233-34. Similarly, should the Court hold that the courts below erred in finding that a violation of the dormant Commerce Clause does not, under any circumstance, state a cause of action under § 1983, the Court should remand this case to the courts below for a determination of whether they must entertain a § 1983 claim challenging the validity of a state tax.[133]

CONCLUSION

The decision of the court below, holding that no cause of action exists under § 1983 for violations of the dormant Commerce Clause, should be affirmed. Alternatively, if the Court should determine that § 1983 generally provides a remedy for violations of the dormant Commerce Clause, this action should be remanded to allow the courts below to

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remedy in compliance with requirements of *McNary*); *Johnston v. Gaston County*, 71 N.C. Ct. App. 707, 712-13, 323 S.E.2d 381, 384 (1984) (same), *review denied*, 313 N.C. 508, 329 S.E.2d 392 (1985); *Spencer v. South Carolina Tax Comm'n*, 281 S.C. 492, 497, 316 S.E.2d 386, 388-89 (1984) (taxpayer may not circumvent state remedies by invoking § 1983), *aff'd by an equally divided Court*, 471 U.S. 82 (1985) (per curium).

[133] Respondents' purpose in presenting this argument should *not* be construed as constituting a lack of faith in the correctness of the Nebraska Supreme Court's decision that the dormant Commerce Clause does not secure rights cognizable under § 1983. Respondents merely seek to apprise the Court of their position that, in the event it should hold that alleged violations of the dormant Commerce Clause are generally cognizable under § 1983, the Court should permit the courts below to consider the *additional* substantial issue of whether Nebraska state courts have an obligation to entertain a § 1983 action in a state tax challenge.

determine whether they are required to entertain a claim under § 1983 in a challenge to a state tax.

Respectfully submitted,

BY ROBERT M. SPIRE
Attorney General

BY L. JAY BARTEL
Counsel of Record
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Of Counsel

ARTHUR E. WILMARTH, JR.
Associate Professor of Law
George Washington University
National Law Center
722 20th Street, N.W.
Washington, D.C. 20052
Tel: (202) 994-6386